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STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

In the Matter of the Application of

LIYANAGAMAGE RANGANATH PRABASHWARA DIAS,

Petitioner,

-against-

UNIVERSITY OF ROCHESTER,

Respondent.

for a Judgment pursuant to Article 78
of the Civil Practice Law and Rules

Index No. E2024003035

Motion #2

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Respondent the University of Rochester (the "University") respectfully submits this memorandum of law in opposition to Petitioner Liyanagamage Ranganath Prabashwara Dias ("Petitioner")'s motion for a preliminary injunction (the "Preliminary Injunction Motion"). For the reasons set forth herein, and for all the reasons enumerated in the University's accompanying Verified Answer and papers in opposition to Petitioner's Article 78 Proceeding, the University respectfully requests the Court deny the Preliminary Injunction Motion, in its entirety and with prejudice.

BACKGROUND

A. Factual Background

For a complete recitation of the Factual Background relevant to the University's opposition to Petitioner's Preliminary Injunction Motion, the University respectfully refers the Court to its Verified Answer and papers in opposition to Petitioner's Article 78 Proceeding, all of which are being filed contemporaneously herewith. *See* Affirmation of Liza R. Magley, dated March 27, 2024 ("*Magley Aff.*"), ¶ 2 n.2.

B. Procedural Background

On February 14, 2024, Petitioner commenced this action by filing a Verified Petition against the University. *See Magley Aff.*, ¶ 3. Contemporaneously, Petitioner filed two orders to show cause. *Magley Aff.* ¶ 4.

In his first order to show cause ("OTSC #1"), Petitioner sought injunctive relief enjoining the University from concluding its investigation into research misconduct alleged against Petitioner, pending unrelated proceedings before the University Committee on Tenure and Privileges ("UCTP"). *Magley Aff.* ¶¶ 5-7. OTSC #1 commenced "Motion #1" on the docket. *Id.*

In his second order to show cause ("OTSC #2"), Petitioner requested the University "show cause" concerning a sealing order, but thereafter requested relief identical to that requested in OTSC #1, as opposed to relief concerning a sealing order. *Magley Aff.* ¶¶ 8-9. OTSC #2 is not associated with any "Motion" on the docket. *See id.*

On February 20, 2024, Petitioner filed an amended order to show cause connected to Motion #1 ("OTSC #3"), seeking injunctive relief similar to that requested in both OTSC #1 and OTSC #2. *Magley Aff.* ¶¶ 10-12. OTSC #3 contains no reference to sealing. *See id.*

On February 26, 2024, Petitioner filed an "amended" order to show cause unconnected to any Motion ("OTSC #4"), but seeking sealing relief similar to that requested in OTSC #2, without reference to injunctive relief. *Magley Aff.* ¶¶ 13-15.

On February 28, 2024, Petitioner filed yet another amended order to show cause, which commenced "Motion #2" ("OTSC #5"), seeking an order that the University be "prohibited from proceeding with the "UCTP Termination Process," until [the University] properly adjudicates [Petitioner's] grievances, and all appeals processes related to those grievances have been exercised." *Magley Aff.* ¶¶ 16-19. OTSC #5 contains no reference to sealing. *See id*.

On February 28, 2024, this Court (Hon. Sam L. Valleriani, J.S.C.) signed OTSC #5 with revisions (the "Order"). *See Magley Aff.* ¶ 20. The Court entered the Order on March 1, 2024. *See id.* ¶ 21. The Order states, *inter alia* that the University shall show cause:

> why an order should not be made, providing the following relief: a temporary restraining order *prohibiting the [University] from allowing utilizing [sic] any University Committee on Tenure and Privileges proceeding related to the termination of [Petitioner] (the "UCTP Termination Process"), until [the University] properly adjudicates [Petitioner's] grievances, and all appeals processes related to those grievances have been exercised*, and why . . . Petitioner, should not have such other and further relief as may be just, proper and equitable.

See id. ¶ 22 (emphasis added). Pursuant to the Order, pending hearing on the motion, Petitioner's request for a temporary restraining order was denied and Petitioner's "request for a preliminary sealing order [was] denied." *See id.* Thus, the Order absorbed all of the most recent orders to show cause (OTSC #4 and #5) into one Order, connected to Motion #2 on the docket. *See id.* ¶ 23.

Based on the foregoing, Motion #2 asks whether the Court should grant Petitioner injunctive relief prohibiting the University from utilizing UCTP proceedings concerning Petitioner's termination until the University adjudicates other grievances concerning Petitioner, including appeals of same.[1] For the reasons discussed herein, this relief should be denied.

---

[1] To the extent the sealing request discussed in OTSC #4 and the Order remains an open question, the University maintains Petitioner has not satisfied his burden to demonstrate compelling circumstances to justify restricting public access to Court records in this action.

"[T]here is a 'broad presumption that the public is entitled to access to judicial proceedings and court records.'" *Maxim, Inc. v. Feifer*, 145 A.D.3d 516, 517 (1st Dep't 2016) (citations omitted); *see also Fordham-Coleman v. Nat'l Fuel Gas Dist. Cop.*, 42 A.D.3d 106, 115 (4th Dep't 2007). "[B]ecause confidentiality is the exception and not the rule, 'the party seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access.'" *Maxim, Inc.*, 145 A.D.3d at 517 (citations omitted). Indeed, "[c]ourts should be reluctant to seal court records even when all parties to the litigation have requested such sealing," especially when an "action raises serious issues of legitimate public concern." *Fordham-Coleman*, 42 A.D.3d at 115 (citations omitted). Accordingly, "a court shall not enter an order in any . . . proceeding sealing the court records, . . . except upon a written finding of good cause . . . In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties." *See* 22 N.Y.C.R.R. 216.1(a).

Based on the University's understanding of the docket, Petitioner's Memorandum of Law in Support of "MOL to seal," filed February 14, 2024 (NYSCEF Doc. No. 24) and the Affirmation of J. Morgan Levy, filed March 1, 2024 (NYSCEF Doc. No. 39) support Petitioner's request to seal these proceedings. Petitioner relies on NSF's Investigation Referral Letter which directs that the investigation should be kept "strictly confidential" (NYSCEF Doc. No. 6). This letter does not on its face have any application where the subject of an investigation (*i.e.,* Petitioner) opts to make the records the focus of a judicial proceeding. Petitioner published his research findings and now commences judicial action concerning them. For reasons apparent on their face, and in accordance with the Court's Order and the cases cited therein, Petitioner has not carried his burden to support the sealing request, especially given the legitimate issue of public concern – correction of the scientific record – Petitioner's claims raise.

ARGUMENT

The most recent characterization of the injunctive relief sought by Petitioner is for an order:

> prohibiting the [University] from allowing utilizing [sic] any University Committee on Tenure and Privileges proceeding related to the termination of [Petitioner] (the "UCTP Termination Process"), until [the University] properly adjudicates [Petitioner's] grievances, and all appeals processes related to those grievances have been exercised, and why . . . Petitioner, should not have such other and further relief as may be just, proper and equitable.

See Magley Aff. ¶¶ 16-19. For the reasons discussed herein, Petitioner is not entitled to this relief.

LEGAL STANDARD FOR PRELIMINARY INJUNCTION

"'A preliminary injunction is an extraordinary provisional remedy to which a plaintiff is entitled only on a special showing.'" *Smith as Trustees of Jay and Patricia Smith Irrevocable Trust. v. Smith as Trustee of Theodore P. Smith Income Only Irrevocable Trust*, 217 A.D.3d 1484, 1486 (4th Dep't 2023) (citing *Margolies v. Encounter, Inc.*, 42 N.Y.2d 475, 479 (1977)); *see Matter of P. & E.T. Foundation*, 204 A.D.3d 1460, 1461 (4th Dep't 2022) ("'[B]ecause preliminary injunctions prevent the litigants from taking actions that they are otherwise legally entitled to take *in advance of adjudication on the merits*, they should be issued cautiously.'" (alterations and emphasis in original) (citations omitted)). Indeed, the Fourth Department has "advised that preliminary injunctive relief is a drastic remedy not routinely granted." *Matter of P. & E.T. Foundation*, 204 A.D.3d at 1461 (citations and internal quotations omitted); *Delphi Hospitalist Servs. LLC v. Patrick*, 163 A.D.3d 1441, 1441 (4th Dep't 2018).

"'The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the lower courts,' and will not be disturbed absent a 'showing of an abuse of discretion.'" *Smith*, 217 A.D.3d at 1487 (citations omitted); *see Matter of P. & E.T. Foundation*, 204 A.D.3d at 1462; *Delphi Hospitalist Servs. LLC*, 163 A.D.3d at 1441-42. These factors must be established "'by clear and convincing

evidence,'" and include "'three separate elements: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of the equities tipping in the moving party's favor.'" *Smith*, 217 A.D.3d at 1486-87 (alterations in original) (citations omitted).

POINT I
PETITIONER CANNOT DEMONSTRATE LIKELIHOOD OF ULTIMATE SUCCESS ON THE MERITS

If a plaintiff cannot demonstrate likelihood of ultimate success on the merits, then the Court should deny preliminary injunctive relief. *See Smith*, 217 A.D.3d at 1487.[2] For the reasons discussed in the University's papers opposing Petitioner's Article 78 proceeding, filed contemporaneously herewith, Petitioner cannot demonstrate likelihood of ultimate success on the merits at all, let alone by clear and convincing evidence. *See Magley Aff.* ¶ 2 n.2. Therefore, the Court should deny the Preliminary Injunction Motion in its entirety.

POINT II
PETITIONER CANNOT ESTABLISH IRREPARABLE INJURY

Even if Petitioner were able to establish likelihood of ultimate success on the merits – he cannot – he would still not be entitled to preliminary injunctive relief because he is incapable of establishing irreparable injury. *See Smith*, 217 A.D.3d at 1487 (if a party cannot "establish that

[2] Petitioner states generally that to demonstrate likelihood of success on the merits, he need only make a prima facie showing of his right to relief, with actual proof to be left to a full hearing on the merits. Yet, the case Petitioner cites in support of this proposition, *Cangemi v. Yeager*, 128 N.Y.S.3d 708 (4th Dept. 2020), is a property case, which is factually inapposite, and Petitioner makes no effort to demonstrate its applicability. Moreover, this proposition understates the drastic nature and high burden of proof on a preliminary injunction motion *and* the reality of an Article 78 proceeding, which is a special proceeding meant to be decided quickly, not after protracted litigation. Petitioner's proposed recasting of his burden may be disposed of easily by the Court.

irreparable injury would result if provisional relief was withheld," then the Court should deny preliminary injunctive relief).

As an initial matter, Petitioner is incapable of establishing irreparable injury because the potential injury alleged is termination of his current position with the University. "It is well settled 'that [i]rreparable injury, for purposes of equity, … mean[s] any injury for which money damages are insufficient.'" *Smith*, 217 A.D.3d at 1487 (alterations in original) (citations omitted). Because it is compensable through monetary damages, it is well-settled under New York law that "[l]oss of employment, although most likely to cause severe hardship, does not constitute irreparable damage." *Armitage v. Carey*, 49 A.D.2d 496, 498 (3d Dep't 1975) (citing *Stewart v. Parker*, 41 A.D.2d 785, 786 (3d Dep't 1973)); *see*, *e.g.*, *Dhillon v. HealthNow New York*, 32 A.D.3d 1197, 1198 (4th Dep't 2006) (finding trial court abused its discretion where the plaintiff "failed to establish any irreparable injury that could not be adequately compensated by money damages," and noting that "[l]oss of employment does not constitute irreparable damages."); *Abramo v. HealthNow New York*, 305 A.D.2d 1009, 1009 (4th Dep't 2003) (finding plaintiff not entitled to preliminary injunction where he could be adequately compensated for loss of patients and fees).

Petitioner asks this Court to grant him preliminary injunctive relief prohibiting the University from proceeding with an internal process that could result in the termination of Petitioner's current position with the University. While this potential result could cause Petitioner hardship, it does not constitute irreparable damages. Rather, if the Court ultimately agrees with Petitioner's position in this action – that the University ought not to have accepted the findings of an Investigation Committee that met more than 50 times, conducted numerous interviews, examined voluminous data, and issued a well-reasoned and analyzed 124 page report finding Petitioner committed research misconduct – and the UCTP determines, based on the Provost's

acceptance of that finding, that Petitioner's contract should be terminated, then the damages arising out of that "premature" contract termination would be measurable monetarily. Indeed, the Court would only have to subtract the difference between the salary and benefits Petitioner would have received if his contract were not terminated from the salary and benefits Petitioner did, in fact, receive, in order to determine his injury. Therefore, the threat of termination of his position with the University is not sufficient to establish irreparable harm at all, let alone by the requisite clear and convincing evidence.

The cases Petitioner cites in support of his argument that potential termination may be sufficient to establish irreparable harm are not to the contrary. At best, Petitioner relies on three cases, none of which were decided in the last four decades, and none of which concern New York State law, in which the Seventh Circuit, the Second Circuit, and the Supreme Court refused to foreclose injunctive relief in "extraordinary" situations arising out of the loss of employment. *EEOC v. City of Janesville*, 630 F.2d 1254 (7th Cir. 1980); *Holt v Cont. Group*, 708 F2d 87 (2d Cir. 1983); *Sampson v. Murray*, 415 U.S. 61, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974). These one-off cases should not eschew well-settled New York law applied in this millennium. And, even if they could, Petitioner has done nothing to demonstrate what makes his case more extraordinary than that of any other New Yorker who faces potential termination of their employment as a result of being found to have committed misconduct of some kind.[3]

[3] The other cases on which Petitioner relies do little more to assist him. *Bashian & Farber, LLP v. Syms*, 46 N.Y.S.3d 202 (2d Dep't 2017) not only is factually inapposite (concerning a law firm bringing an action against a client to recover on attorneys' fees), but also demonstrates that irreparable injury cannot exist where monetary damages are available. *Id.* at 205 ("Since the plaintiffs would be sufficiently compensated by money damages . . . the plaintiffs failed to demonstrate that they could not be fully compensated by a monetary award[.]"). *Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212 (4th Dep't 2009), on the other hand, is a property case, and is thus, factually inapposite on its face and wholly unpersuasive.

Moreover, even if Petitioner could somehow show that the termination of his employment is somehow distinguishable from well-settled New York law, the "threat" of termination of his employment is not sufficient to demonstrate irreparable harm. It "is well settled that the prospect of irreparable harm must be 'imminent, not remote or speculative.'" *Matter of P. & E.T. Foundation*, 204 A.D.3d at 1461 (citations omitted); *see White v. F.F. Thompson Health Sys., Inc.*, 75 A.D.3d 1075, 1077 (4th Dep't 2010). Petitioner argues that his professional reputation will be impacted if he is terminated from the University. This is an argument that is remote and speculative. It is unclear that his "termination" from the University – assuming that is what eventually occurs – would become known to others; faculty voluntarily separate from colleges and universities all the time, and Petitioner is not tenured at the University. Even if others came to understand that Petitioner was separated involuntarily, this does no more than put him in the same situation as other plaintiffs and petitioners who are uniformly denied injunctive relief staying their terminations. Petitioner's argument that he is special and that a termination of his faculty status would be especially harmful in a way not compensable by monetary damages is unsupported, self-serving speculation.

If and to the extent Petitioner is the object of any public attention, it is only because he has invited it with his bold scientific claims, which he chose to publish and make part of the scientific community's discourse. It seems perverse to allow Petitioner to make himself and his science the object of intrigue and then to also allow him to seek judicial refuge when his science, and therefore, his employment as a faculty member at the University, are called into question.

As this Court knows, irreparable harm is more readily shown in property cases because of the well-settled lack of adequate monetary relief.

While Petitioner may not want to be terminated from his position with the University, a termination of employment is the kind of harm that is compensable with monetary damages. Petitioner's arguments about his professional reputation are remote and speculative, and the equities do not support the extraordinary measure of injunctive relief. Thus, Petitioner has not – and cannot – demonstrate that the drastic remedy of injunctive relief should be granted in this action, and the Court should deny the Preliminary Injunction Motion in its entirety.

POINT III
PETITIONER CANNOT SHOW THE BALANCE OF EQUITIES WEIGHS IN HIS FAVOR

Petitioner cannot demonstrate likelihood of ultimate success on the merits by clear and convincing evidence. He cannot demonstrate irreparable injury by clear and convincing evidence. It should be no surprise, then, that Petitioner cannot show the balance of equities weighs in his favor by clear and convincing evidence. "'In balancing the equities, a court must inquire into whether the irreparable injury to be sustained … is more burdensome [to the plaintiff] than the harm caused to [the] defendant through imposition of the injunction.'" *Smith*, 217 A.D.3d at 1487; *see Delphi Hospitalist Servs. LLC*, 163 A.D.3d at 1442. If a plaintiff cannot make this showing, no preliminary injunction should issue. *Smith*, 217 A.D.3d at 1487.

As discussed in Point II, *supra*, there is no irreparable injury to Petitioner arising from his potential termination. Yet, for the University, there are equitable principles that would be infringed if Petitioner were to be granted the relief he seeks.

There is a long line of New York judicial precedent reserving to a university the right to make decisions about its faculty. The selection of faculty is "one of the most critical campus choices". *New York Inst. of Tech. v. State Div. of Human Rights*, 40 N.Y.2d 316, 322 (1976). This foundational principle is that a university should decide for itself, with only the most limited judicial intervention, who is sufficiently qualified in an academic field to educate the university's

students and otherwise represent the university in the wider academic community. The injunctive relief Petitioner seeks would infringe on that well established, judicially protected prerogative.

What Petitioner fails to realize is that while his potential injury – termination – is easily addressed and compensable with monetary damages; but the potential injury to the University – permitting a faculty member whose publications have been retracted and who has been found to have committed research misconduct to continue working and researching with the University – cannot be redressed financially. The University's primary responsibility is to use its academic judgment to select the faculty who will teach its students. The University cannot be compensated, and its students cannot be compensated, if the University is required to keep as a member of its faculty a person in whom it has lost pedagogical faith. The University cannot be compensated for the damage to its reputation that may be caused by continuing to allow Petitioner to hold himself out as an endorsed member of the University's faculty body even though the University, if left to its own prerogative, would have withdrawn its affiliation with him. These concerns cannot be assigned a number, but they demonstrate the irreparable injury the University would be forced to endure if the Court stopped the process dictated by its handbook to handle the potential termination of a faculty member found to have committed research misconduct in the form of "fabrication, falsification and plagiarism."

CONCLUSION

Based on the foregoing, and for all the reasons enumerated in the University's accompanying Verified Answer and papers in opposition to Petitioner's Article 78 Proceeding, the University respectfully requests the Court deny Petitioner's Preliminary Injunction Motion, in its entirety and with prejudice.

Dated: March 27, 2024

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22 N.Y.C.R.R. 202.8-B CERTIFICATION

I, Liza R. Magley hereby certify that the foregoing memorandum of law was prepared on a computer using "Times New Roman" typeface, in 12-point size, with double-line spacing, and that the total number of words in the memorandum of law, exclusive of its caption, table of contents, table authorities, signature block, and 22 N.Y.C.R.R. 202.8-b Certification, as calculated by the word processing system used to prepare this brief, is 3,327.

Dated: March 27, 2024

Liza R. Magley